Supreme Court, U.S.
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No. 09-786

IN THE
SUPREME COURT OF THE UNITED STATES

EDWIN E. NAYTHONS,

Petitioner,

v.

STRADLEY, RONON, STEVENS & YOUNG, LLP, and ANDRÉ L. DENNIS,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

This petition presents a single question -- the extent of a federal court's authority, when sitting in diversity, to extend a state common law privilege that defeats a civil action beyond anything allowed by the state's supreme court:

> May a federal court exercising diversity jurisdiction properly extend a state common law privilege to a legal context where the state courts themselves have not applied it, thereby virtually negating either a common law or statutory cause of action of that state which by its nature is inconsistent with the applicability of the privilege?

Pet. i. The respondents do not counter-state the question, apparently conceding that the federal issue presented by this case has been accurately stated by petitioner. Respondents' three reasons for denying the writ are unpersuasive, and to a large extent rest on misstatements of the case.

1. Respondents pretend not to see the "recurring issue of federalism" presented by this case. BIO 6, quoting Pet. 3. The issue, of course, is stated in the Question Presented: Should a federal court blaze a new trail through state law, when the state's supreme court has repeatedly shown reluctance to take the same step?

Here, the district court and Third Circuit applied Pennsylvania's doctrine of "judicial privilege" to require dismissal of claims for abuse of process and wrongful use of process. Since "judicial privilege" immunizes statements made in the course of judicial proceedings, applying that doctrine to an action for abuse of process would eliminate a large part of that tort's domain. The Pennsylvania Supreme Court has never applied the doctrine to an abuse of process claim, and as elaborated at some length in the Petition in fact repeatedly has avoided doing so, while expressing skepticism at the extravagance of the intermediate Superior Court's dicta in this regard. Pet. 11-15.[1]

The district court here, as affirmed by the Third Circuit, dismissed petitioner's action on a ground that his never been endorsed by the state's highest court. Petitioner has not denied that this Court seldom overturns a federal circuit court decision on a point of state law. But respondents are wrong to suggest that it takes a circuit split to get the Court to do so. BIO 7.[2] In neither of the cases cited by respondents, Haring v. Prosise, 462 U.S. 306 (1983),

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[1] As noted in the Petition, only one appellate case in the history of Pennsylvania appellate jurisprudence appears actually to have applied the doctrine of "judicial privilege" as the ground for dismissing an action for abuse of process. And that case, Passon v. Spritzer, 277 Pa.Super. 498, 419 A.2d 1258 (1980), a 30-year old decision of the Superior Court, contains no discussion of the point.

[2] Respondents repeat this red herring argument at page 10 of the BIO.

and Helvering v. Stuart, 317 U.S. 154 (1942), was there a circuit split on the point of state law the Court addressed. (Indeed, there could rarely be such a split.)[3] It is the imprudence of the Third Circuit and district court's decisions in this case, as a doubtful exercise of the federal courts' diversity jurisdiction in the face of the state supreme court's caution, that gives rise to the federalism problem.

2. The Third Circuit decision was based on the doctrine of "judicial privilege" and nothing else. "Because we find the issue of judicial privilege so overarching in this matter, we do not reach the alternate bases for the District Court's decision." Pet. App. A6 n.5. That is the doctrine on which the courts below exceeded the proper bounds of their discretion in determining state law. Respondents

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[3] Whether there is or is not "any other federal (or state) case in which an arbitrator has ever attempted to bring claims for abuse of process or wrongful use of civil proceedings against a law firm based on court filings," BIO 7, has nothing whatever to do with the basis of the present petition. The Third Circuit decision, of which review is presently sought, does not turn on petitioner's status as an arbitrator. The sole basis of that decision is that the statements made in court filings are privileged and cannot form the basis for a claim of abuse of process. It is that facially dubious proposition that the Third Circuit held, with no support in any decision of the Supreme Court of Pennsylvania, to be a sufficient ground for dismissing petitioner's action. While it may be true that this Court is more likely to grant certiorari to resolve a split in the Circuits, the Court in innumerable appropriate cases has exercised its power to address important issues and to correct significant legal errors not arising in the context of a circuit split.

profess surprise that the petition does not discuss whether the Third Circuit's decision in this case was consistent with circuit precedent. BIO 8. But since the decision below never cited the other Third Circuit cases that respondents now mention, see Pet. App. A, and since any departure from the Circuit's own precedent would not form a basis for certiorari, it is unremarkable that the petition makes no mention of that tangential point.

The question presented, like all legal questions, arises in a particular factual setting, but it is not unduly fact-bound. It is based on the purely and broadly legal basis for the decision below. When the petition refers to the "legal context" of the case (BIO 9, quoting Pet. i) it clearly does not mean the "specific factual context." Rather, the petition's Question Presented refers not to the factual setting but to the "legal context," that is, the actions for abuse of process and wrongful use of civil proceedings.

3. Respondents repeatedly frame the underlying state law issue in terms of whether "an arbitrator" can bring the kinds of actions at issue here. BIO 9, 10. But as already noted, while that was a basis for the district court's decision, it was not the ground on which the Third Circuit ruled. And it is the Circuit's judgment that would come before this Court for review. Nor would the existence of that other ground, never addressed by the court below, be a proper basis to deny certiorari in this case.

The district court ruled that petitioner could not bring his action because he was not a "party" to the

underlying litigation. For this proposition, the district judge (sitting by designation) repeatedly cited a Superior Court decision, Hart v. O'Malley, 647 A.2d 542 (1994), Pet. App. B6, B8, B12-B15, without once noting that an appeal had been allowed in that case and a superseding opinion issued by the Pennsylvania Supreme Court: Hart v. O'Malley, 544 Pa. 315, 676 A.2d 222 (1996). The Supreme Court decision, unlike the Superior Court (cited on this very point by the district court, App. B8), recognized that "a civil proceeding can operate against a non-party in a direct and particular way as fully as against a party, perhaps more so. ... Such is true here ...." Id. at 225. With respect to any recusal petition, the named jurist is akin to such a party. It is thus no surprise that the Third Circuit did not affirm the district court on this ground.[4]

Respondents argue that they "ultimately prevailed and persuaded a Pennsylvania appellate court to overturn [petitioner's] adjudications ...." Pet. 1, referring to Shelton v. Patterson (noted at 942 A.2d 967 (Pa. Commw., Jan. 31, 2008) (table), 3d Cir. App. 1147-66), referenced at Pet. 6. But respondents prevailed on none of the unfounded and harmful

[4] Although it is not uncommon for judges to provide a direct refutation of the allegations of recusal petitions (see, e.g., Cheney v. U.S. District Court, 541 U.S. 913 (2004) (Scalia, J.)), petitioner was not even permitted to intervene and be heard (he attempted to do so by counsel) in opposition to the motion for recusal containing unwarranted attacks on him. 3d Cir. App. 197 (9/20/06 "decree" of Judge Herron), 797-98 (petitioner's response).

accusations against petitioner which underlay his action against them. Those were all dismissed. See Pet. 5-6.[5] Thus, it is not the petitioner who seeks to "muddy the waters" here. BIO 1-2.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] Respondents knew of the threat against petitioner long before he himself did, 3d Cir. App. 092-94 (transcript of 8/3/06 conference), but took no action to seek his recusal on that basis until two months later, in a desperate and disingenuous effort to overturn petitioner's devastating decision against their client.

[6] Respondents even stoop to accusing petitioner of disparaging the qualifications of the jurists who sat on the courts below. BIO 5 n.1. To the contrary, all the petition does in that regard is refer to and apply a line of reasoning found in this Court's cases of this kind. Pet. 16 n.13.